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DUTY TO SEEN TRESPASSERS.

MAY the seen trespasser recover for injuries alleged to have been negligently inflicted upon him by the active intervention of the landowner?[1] Some authorities say yes, others no. For convenience in discussion the former may be called the Michigan rule, the latter the Massachusetts rule. By the Michigan rule the fact that the trespasser's presence is known has an important relation to the burden of conduct imposed upon the landowner. He is thereafter bound to exercise ordinary care with reference to the intruder. "Where a trespasser is discovered upon the premises by the owner or occupant, he is not beyond the pale of the law, and any negligence resulting in injury will render the person guilty of negligence liable to respond in damages."[2] By the Massachusetts rule, as usually stated, he is under no such obligation; his sole duty being to abstain from intentional injury. "The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. . . . Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term 'wilful negligence' is not a strictly accurate description of the wrong. But wanton and reckless neg-

[1] The term "landowner" is used throughout this article to designate one in the possession of land, whether it be as owner of the fee or under a lesser right. It includes all against whose possession the trespass is an offense.

[2] Herrick *v.* Wixom, 121 Mich. 384, 80 N. W. 117, 81 N. W. 333 (1899).

ligence in this class of cases includes something more than ordinary inadvertence. In its essence, it is like a wilful, intentional wrong." [3]

The rule of non-liability to unknown and unsuspected trespassers for injuries inflicted upon them has hardly ever been doubted. While the true ground upon which the conclusion rests has not always been stated, yet it seems now to be generally recognized. The defendant is not liable, because he has not been guilty of a breach of any duty owed to the plaintiff.[4] This bald statement of the law's conclusion on the matter is all that is ordinarily needed in that class of cases. It is usually enough to know that a recovery is denied. But when we pass to the more troublesome questions touching the rights of trespassers whose presence is known, it becomes desirable to ascertain the reason why there is no duty to use care toward the unknown but actually present trespasser. Is the reason one equally applicable in both cases? If so, of course one plaintiff should stand no better (or worse) than the other. But if the reason for the rule as to unknown trespassers is found to be the lack of knowledge of the situation, then there is good ground for applying a different rule in cases where the reason for this one does not exist.

It may aid in the subsequent discussion to call to mind some of the elements of negligence as defined in law. The actor is judged by an external standard. "The law works only within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience." [5] Once it was thought this standard varied with varying situations, and degrees of negligence were laboriously if not very practically defined. But we are long past this stage of the law, in theory at least. It is now seen that one standard should apply in all cases. Ordinary care under the circumstances fits every case, and leaves the variation where it belongs. The precaution required is greater or less in proportion to the environment of the actor. If the existence of

[3] Bjornquist *v.* Boston & Albany Railroad Co., 185 Mass. 130, 134, 70 N. E. 53 (1904).

[4] Judge Jeremiah Smith, in 25 HARV. L. REV. 238, 242 *et seq.*; Garland *v.* Boston & Maine Railroad, 76 N. H. 556, 86 Atl. 141 (1913).

[5] Holmes, Common Law, 110.

circumstances is in doubt, the facts are settled in the usual way. So, too, if the sufficiency of the acts done or omitted to satisfy the standard is questionable, that issue is left to the jury.

Is the rule of ordinary care under the circumstances of universal application, or are there instances where it does not apply? The logical answer is that the rule should have no exceptions. Calling as it does for reasonable conduct, and no more, why should there be any situation in which it is not the true guide to and test of lawful conduct?

It may be said that the unanimous holding that there is no duty to use care toward the unknown trespasser shows that the rule is not universal. But there is no exception here, for the presence of the unknown trespasser is not, either in law or in fact, a circumstance which ought to or could influence the landowner's conduct. Conduct is influenced by the impression made upon the individual by what he knows, or thinks he knows. Sometimes the law says what he ought to know is to be added to his actual information. But neither in fact nor by fiction of law is one charged with knowledge not possessed, and which he is not in any sense in the wrong for not possessing. The presence of the unknown trespasser is not a circumstance as the word is here used.

It is dangerous to strike a stick of dynamite. But if one strikes it reasonably believing it to be a bit of kindling wood, his act is not shown to be wrongful by proving the concealed ingredients of the object dealt with. He was not called upon to act with reference to dynamite.[6]

The stereotyped statement of the rule that as to the unknown trespassers the landowner owes no duty to use care, is likely to mislead. It more than half implies that the situation is one where care could be exercised, if the law demanded it. But their unknown presence is to him the equivalent for their absence. It is nonexistent as to him. It is not related to his acts and therefore cannot control or modify his conduct. How could one use care towards a person or an object whose existence was unknown and unheard of? "A choice which entails a concealed consequence is as to that consequence no choice." [7]

[6] "Relatively to a given human being, anything is accident which he could not fairly have been expected to contemplate as possible and therefore to avoid." Holmes, Common Law, 94.

[7] Holmes, Common Law, 94.

If it be urged that the landowner should proceed with caution upon a vague general theory of always looking ahead, how much is he to take heed to his ways? The duty is to use care proportionate to the reasonable apprehension of danger to others. Where there is no reason to apprehend any danger, because no persons are or are likely to be present, one factor is lacking, and the amount of care required is reduced to zero. But when this factor is present, it inevitably follows that a result expressed in positive terms will be reached. Toward known circumstances one can and should act reasonably. It is impossible to act toward unknown facts.

So far as the unknown trespasser is concerned there is no exception to the rule of ordinary care, and we come to the case of the known trespasser with a rule as yet unimpaired. If the Massachusetts rule as to the seen trespasser is the correct one, then it is true that the rule of ordinary care is not universal, and a time comes when one may lawfully fail to use such care toward a person whose presence is clearly understood. So long as the actor stops short of inflicting an intentional injury, he is not a wrongdoer before the law. No satisfactory reason for thus infringing upon the rule of reasonable conduct has been given. The one most frequently advanced is that the plaintiff cannot by his own wrong (*i. e.* his trespass) impose a duty toward him upon the innocent landowner.[8] The plaintiff's wrong may be, and frequently is, a sufficient answer to his claim to recover; but this is because of his fault, not the defendant's freedom from fault.

Why, then, is not the Massachusetts rule well enough in its results? If it is true that the plaintiff's wrong had a part in causing his injury, why should he recover from one who at the most was only a joint tortfeasor with him? There can be but one logical answer to this.[9] When they are joint wrongdoers neither should recover from the other. But cases frequently arise where that is not the situation, cases where the wrong of one is the mere

[8] It would appear, however, that this is not the reason in Massachusetts, for the doctrine that the landowner is liable only for what is called reckless or wanton conduct is applied in suits brought by licensees, the same as in the case of a trespasser. West *v.* Poor, 196 Mass. 183, 81 N. E. 960 (1907); Jones *v.* New York, New Haven & Hartford Railroad Co., 211 Mass. 521, 98 N. E. 607 (1912); Heinlein *v.* Boston & Providence Railroad Co., 147 Mass. 136, 16 N. E. 698 (1888).

[9] Assuming, of course, that the doctrine of comparative negligence is not to be considered.

occasion for, while that of the other is the active cause of, the injury. It is not the purpose of this article to discuss the scope of the "last clear chance" doctrine. It is enough to say that even those jurisdictions where the doctrine has been denied,[10] recognize that there must be some limit to legal causation short of the remote effects of a long past and completed transaction. It is this phase of the subject which courts following the Massachusetts rule have failed to sufficiently consider. It is undoubtedly true that a trespass is a continuing wrong; but unless it is of worse degree (in law) than negligence, there seems to be no valid reason for denying the application of the last clear chance doctrine. The principle applies when the plaintiff's fault consists of a positively illegal act, the same as when his fault is only one of omission.[11]

It is sometimes said that the Michigan rule places the trespasser upon a par with those who are present as of right. But this is not true if the rule is limited as it should be. The fact that the trespasser is a wrongdoer is neither overlooked nor condoned. He is at once told that he must show that at the time of the injury right conduct on his part would not, while like conduct on the defendant's part would, prevent the mishap. For example, the trespasser walking along a single track railroad can at any time get off the right of way. He can cease from his sinning long after the negligent engineer can stop the oncoming train. In such a case there can be no recovery.[12] But if he is walking over a long trestle the situation may be reversed. The engineer may be able to take the steps necessary to avoid trouble long after it has be-

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[10] Pennsylvania Company *v.* Sinclair, 62 Ind. 301 (1878).

[11] Black *v.* New York, New Haven & Hartford Railroad Co., 193 Mass. 448, 79 N. E. 797 (1907). But while a last clear chance theory is here applied in the case of a trespasser, it is still insisted that even when the plaintiff's wrong has become a mere condition, the duty to use ordinary care under the circumstances is not owed to him. Although it is held that his wrong has ceased to be a cause of the injury, it is still treated as an excuse for lack of ordinary care on the part of the defendant toward a known situation. The fact that the plaintiff is a trespasser is counted against him in double measure. First it relieves the defendant from any obligation to use ordinary care; and beyond that, the plaintiff must show that it has ceased to be a cause and has become merely a condition of the infliction of injury upon him. The injustice of this rule is recognized in a degree by the earlier cases which hold that in actions for wanton wrongs contributory negligence is not a defense. Aiken *v.* Holyoke Street Railway Co., 184 Mass. 269, 68 N. E. 238 (1903).

[12] Batchelder *v.* Boston & Maine Railroad, 72 N. H. 528, 57 Atl. 926 (1904).

come impossible for the trespasser to escape. In this case he may recover. In both cases the defendant is a wrongdoer. In one he escapes liability because of the concurrent fault of the plaintiff, while in the other that fault merely affords an occasion for the infliction of injury.[13] In a sense it is true that the wrongful act of the plaintiff imposes a duty upon the defendant; but in a broader sense it is not true. It is the plaintiff's present situation that plays a part in imposing the duty. The fact of his presence calls for a certain modification of proposed action. Future action is under consideration, and should be governed by present facts. These facts are not made non-existent by proof that they ought not to exist. They are here, and the landowner must act in reference to them, whether he wishes to or not. They have become a part of the causes moving him to action or non-action. They may have great or little weight in influencing his reasonable conduct; but to say that they have no weight seems a manifest denial of an evident truth. Men do take such situations into account, and take some precaution in consequence.

The trespasser is on a less favorable footing than the invitee in another respect. The landowner is held to the care of the average man in each case. It may be and probably is true that the ordinary man takes more precaution for the protection of those he has invited upon his premises, or of those even to whose presence he only consents, than he would for the benefit of the known intruder. In each case he would act up to the standard fixed by law. Therefore it is not inappropriate to instruct the jury that the fact the plaintiff was a trespasser is one of the circumstances they should take into account in determining the amount of precaution required to make an equivalent for the conduct of the average man. It is equally proper to withdraw certain cases from the jury upon the same ground.[14]

These two propositions seem to differentiate the trespasser quite definitely from the invitee, to put him in a class by himself, and that as distinctly below those who enter rightfully as his wrongful entry ought to require. He must prove that such entry and his

[13] Cool. Torts, 1 ed., 674.

[14] This position is forcibly argued in some of the cases which apply the Massachusetts rule. Bjornquist *v.* Boston & Albany Railroad Co., 185 Mass. 130, 70 N. E. 53 (1904).

continued wrongful presence merely furnished an occasion for the defendant's subsequent negligent conduct; and the defendant's conduct is to be judged by that of the average man toward trespassers under similar conditions.

It has been said [15] in connection with this subject that "no distinctions which are not susceptible of clear statement and comprehension, and which when stated do not appeal to common sense, can be of any real value or entitled to a permanent place in the law." That is, the proposition should be one that can be effectively argued to a jury. Certainly this rule squarely meets the test. That men should always be reasonably careful, must be the pole star in that branch of the law which, professedly at least, has its beginning and its ending in reasonable conduct.

But it is further said that while the Michigan rule as to the known trespasser may be well enough, taken by itself, there are great difficulties in also holding that there is no such duty toward unknown trespassers; that the two positions are inconsistent, and one or the other should be abandoned. What, it is asked, is the difference between seeing the trespasser's head through a car window, and seeing the side of a car in which travelers are expected to be, and among whom a trespasser is present?

In the first case the intruder is actually seen. No question of anticipation is involved. His presence is known; and, being known, it inevitably becomes one of the circumstances under which the defendant acts. But in the second case the plaintiff is not seen, and we are at once brought to the question of anticipation. How much ought the oncoming motorman to anticipate? Whose presence had he some knowledge of — the public generally or a certain class? He had no knowledge of the actual presence of the trespasser, and no information of the likelihood of such presence. Wherein, then, is there reason to charge him with notice simply because he knew persons of another class, whose classification was the reason for and justification of their presence, were to be expected? Of course it would be no excuse for failure to anticipate to say that only fat men had appeared before, whereas

[15] By Dean Thayer, whose stimulating discussion of this subject has been of the greatest assistance to the writer. His idea is more fully expressed in the last number of the Review, *ante*, p. 318. Public Wrong and Private Action, by Ezra Ripley Thayer, 27 HARV. L. REV. 317.

the plaintiff was lean. The classification would fail to classify in any respect material to the question at issue. But when the classification is based upon the same facts as the reason for anticipation, it becomes an essential part of the situation. The motorman had occasion to anticipate the presence of passengers. Their probable presence was a circumstance with reference to which he was bound to act. On the other hand, the presence of unknown and not to be anticipated trespassers was not a circumstance. Not only is it true that reason does not demand that he act with reference to them, but it is difficult to perceive how he could so act. The distinction between this case and that of the seen trespasser is fundamental. In the case of the seen trespasser his presence became a circumstance (however unwelcome) with reference to which the actor was bound to shape his future conduct, so far as reason demanded.

There are always border line cases which severely test any rule; hence litigation, disagreeing juries, and dissenting opinions. Most distinctions in law are of degree rather than of kind. The question whether it would be better policy on the whole to make men responsible for all the consequences of their acts has not here been taken into consideration. It has been assumed that "the coarse and impolitic principle that a man acts always at his peril," [16] has not as yet been sufficiently approved by mankind in general to be taken account of in this discussion. It is still true that a line must be drawn somewhere. The adherents of the Michigan rule have sought to draw it by the rule of reason. It appears to them that the Massachusetts doctrine is a denial of the applicability of that rule in certain cases; that it says in effect that an unintended trespass is a greater wrong than negligence, so much greater that its commission makes the doer of the deed an outlaw from the otherwise universal rule of reasonable conduct.

Appeal is also made to authority. It may be said that in most jurisdictions the Massachusetts rule is adopted, or the Michigan rule is denied. A study of the precedents is highly instructive. It illustrates the steady, if often unacknowledged, progress of reason in its advance against an arbitrary rule. It is true that courts in many jurisdictions have declared the Massachusetts rule to be

[16] Holmes, Common Law, 163.

the law; but it is also true that a majority of these courts have applied the substance of the Michigan rule. In a few states the rule less favorable to the plaintiff has been consistently adhered to. Massachusetts is the most notable example of this class.[17] The use of such misleading terms as "wilful negligence" [18] has been disapproved of, and it is said that the wrong is "in its essence . . . like a wilful, intentional injury." [19] In these jurisdictions proof of negligence, even of "gross negligence," is not enough.[20]

But many of the cases from other states which declare an adherence to the form of the rule deny its substance, when it comes to a practical application. For example: A declaration that negligence is not wilfulness, and that the landowner "owes the trespasser no protection against negligence," seems a strong statement of the Massachusetts rule. But when this is immediately followed by a holding that it does "owe him the duty of all reasonable effort to avoid injuring him when his presence and his own inability to avoid injury are known to it," [21] it becomes evident that the Michigan rule is the one in fact applied.

One other instance will suffice to illustrate the point. "The only duty the company owed him was not to wantonly or wilfully injure him. Had its employees seen him in time to save him, it would have been their duty to use ordinary care to do so." [22] These and other cases, of a similar tenor, show that, consciously or unconsciously, courts are impelled toward the rational rule of conduct, even in the face of a supposed legal principle to the contrary.

Judge Cooley seems to have entertained the view that calling negligence recklessness added something to the situation. "If,

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[17] The tendency of the earlier cases in that state was toward the Michigan rule. In Lovett *v.* Salem & South Danvers Railroad Co., 9 Allen 557 (1865), that rule is stated with approval. But the rule now applied was announced a few years later, apparently upon the authority of cases relating to the condition of premises, and without considering whether a different principle applied to cases of active intervention after the trespass was known to the defendant. Johnson *v.* Boston & Maine Railroad, 125 Mass. 75 (1878); Morrissey *v.* Eastern Railroad, 126 Mass. 377 (1879).

[18] Barstow *v.* Old Colony Railroad Co., 143 Mass. 535, 10 N. E. 255 (1887).

[19] Bjornquist *v.* Boston & Albany Railroad Co., 185 Mass. 130, 70 N. E. 53 (1904).

[20] Santora *v.* New York, New Haven & Hartford Railroad Co., 211 Mass. 464, 98 N. E. 90 (1912).

[21] Parker *v.* Pennsylvania Company, 134 Ind. 673, 34 N. E. 504 (1893).

[22] Huff *v.* Chesapeake & Ohio Railway Co., 48 W. Va. 45, 35 S. E. 866 (1900).

therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection." Yet in his next sentence the fallacy is exposed. "Or it may be said that in such a case the negligence of the plaintiff only put him in a position of danger, and was, therefore, only the remote cause of the injury, while the subsequent intervening negligence of the defendant was the proximate cause." [23] Eliminating from the list of supporters of the so-called intentional injury rule, those which qualify it in some such manner as those just quoted, it appears that the authorities are pretty evenly divided.

One other point deserves consideration. The Massachusetts rule is advocated because it is practical. It is said that the proposition it stands for is easily understood and readily applied by juries, while the Michigan rule involves reasoning too subtle and distinctions too fine to be comprehended by those not expert in such matters. And this leads to the inquiry, what does the Massachusetts rule mean? A similar inquiry has often been made concerning the Michigan rule, and the question has been much discussed. Close cases and perplexing situations have sometimes made it appear over refined; and attempts to treat questions of fact as though they were problems in law have led some to the conclusion that the rule is vague and uncertain. On the other hand, it has been assumed in many cases that the phrase "intentional injury" was a very simple one, and hence a very desirable one to incorporate in the law. Is it simple?

An act may be intentional in the sense that the actor understands that he is performing it and wills to do so, yet wishes some of its known consequences might be avoided. Or the intent may go beyond this and include not merely the will to do the act, but also the desire that all the consequences follow. One may often feel compelled to cause results he wishes he could avoid, or he may cause them for their own sakes. He may regret that his passing team will bespatter the foot travelers with mud, yet he must drive on. He does the act intentionally, fully understanding and

[23] Cool. Torts, 1 ed., 674.

anticipating the results to pedestrians, but without wish to do them harm. Again, he travels on the muddy side of the way when the other side is dry ground, intending to thereby bespatter people on the sidewalk. He drives on the muddy side for that reason. This time his state of mind includes an element which was wanting in the earlier case. If this were the element to which the Massachusetts rule refers there would be no liability unless it were shown that the damage (or some damage) had been done because the defendant desired to inflict injury; or, as has been said in another connection, unless the damage was done "for its own sake." [24]

Such a theory of liability is denied by high authority. "It must be borne in mind that the law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is action on the wrong side of the line, be that act blameworthy or otherwise." [25] The rule, then, should be stated, not in terms of morality, but of acts permitted or prohibited. The defendant must be judged by the surrounding circumstances, including of course his own knowledge of them (actual or imputed), but excluding the desire which moves him to action.

While some of the cases seem to indicate that state of mind is the important thing, at the same time they say that the state of mind can be shown only by inference from the surrounding circumstances.[26] All of which leads back to the proposition that the test really applied is not state of mind but reasonableness of conduct. The question is not what this man thought, but what ought he to have thought, or apprehended, as a reasonable being? If this position is correct, it follows that mere intent to inflict in-

[24] Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077 (1896). Dissenting opinion of Holmes, J.

[25] Holmes, Common Law, 110; Commonwealth *v.* Pierce, 138 Mass. 165 (1884).

[26] Bjornquist *v.* Boston & Albany Railroad, 185 Mass. 130, 70 N. E. 53 (1904).

jury is not sufficient to create liability. It must be shown further that such intentional interference with the person of the trespasser was unreasonable. The law is so stated in the leading case just cited. If intent is shown, the lesser and essential element of knowledge that certain consequences will probably ensue is also shown. But this is the only importance [27] to be attached to the fact that the act was induced by an evil purpose.

Two farmers set out to mow their fields. Each knows a trespasser is in his path. One runs the intruder down, with an intent and a desire to do him injury. The other has the same knowledge, and does exactly similar acts, with a belief that the trespasser in his field will get out of the way, and without desire or intent to inflict injury. If the actor's state of mind were the test, the first would be liable and the second not liable. But the question of liability in the second case would not be disposed of on these facts alone. There would be further inquiry as to whether there was any reasonable ground for the defendant's complaisant attitude.[28] If there was not, the jury would be told that he is presumed to intend the usual and ordinary consequences of his act, — that they should find, contrary to the fact, that he intended the result which followed his act. Here again the substance is that intent is not necessary at all, but that the landowner's acts are to be judged by the standard of the average prudent man.

Now suppose that in the first case the chance of injury was very remote, so remote that no reasonable man would anticipate it as likely to occur. Is the defendant liable because he believed and hoped it would happen? And if so, which is the important element — his belief or his desire? Manifestly, the former. His belief is his foresight, it is to him a kind of knowledge; and being knowledge, it is one of the circumstances under which he acts and in view of which his conduct is to be judged.[29] But his desire has no such bearing and cannot logically be considered on the question of his guilt. It no more charges him with liability than his neighbor's kindly feeling for the intruders excuses lack of reasonable judgment on his part. Men must act reasonably in

[27] Except, in some jurisdictions, on the issue of damages.

[28] Bjornquist *v.* Boston & Albany Railroad Co., 185 Mass. 130, 70 N. E. 53 (1904); McKeon *v.* New York, New Haven & Hartford Railroad Co., 183 Mass. 271, 67 N. E. 329 (1903).

[29] Holmes, Common Law, 57.

their present circumstances. They must foresee as much as the average man. Beyond this, they must use the foresight they actually possess, even when it exceeds that of the ordinary individual. They are judged by their acts, not by how they feel toward any person or thing. The standard is consistently external. Given the surrounding facts, including of course the special knowledge of the party, the only other material questions are, what did he do? and, finally (under the Massachusetts rule), was what he did reckless or wanton?

The test under that rule seems to be found in the degree of danger to be apprehended from the act. If the danger is nonexistent, or nearly so, the conduct may be due care. If the danger is considerable, and the average man would avoid it, there is negligence in the ordinary sense. If the danger is very great, so that the average man would understand not only that it was prudent but necessary to act so as to avoid it, then the act is called wanton or reckless.

The standard of the average man is not to be used by the jury in testing liability under this rule. That standard is available to determine what the defendant ought to have known and anticipated, but for the ultimate question — was what he did actionable? — some other test is employed. It seems to be this: was the act one that a reasonable man would have understood involved seriously and unreasonably endangering life or limb? This is the test given for criminal negligence,[30] to which the present wrong is likened.[31] Even here the factor of reasonableness is not entirely gotten rid of, yet it is not now the test. The test is the imminence of the danger. Just what degree of danger is so great that invoking it may be termed wanton or reckless conduct seems incapable of further definition.

While it is said that the fault must be something greater than the gross negligence sometimes spoken of in statutes and decisions, yet the fact remains that it may consist of inadvertence. It is the failure to come up to the standard of conduct which has been set. "Reckless negligence" [32] is only the failure to use the care the law

[30] Commonwealth *v.* Pierce, 138 Mass. 165 (1884).

[31] Aiken *v.* Holyoke Street Railway, 184 Mass. 269, 68 N. E. 238 (1903).

[32] Bjornquist *v.* Boston & Albany Railroad Co., 185 Mass. 130, 134, 70 N. E. 53 (1904).

requires under the circumstances. To say to a jury that the defendant must have used the care the law required under the circumstances, and, further, that the care demanded is less than the average man would have used in the same situation, sounds odd, to say the least.[33]

Examining the cases applying this rule by the light of Dean Thayer's test, it seems inherently defective. How is it to be defined or limited, so that a jury may intelligently apply it to the evidence? The task has not been found an easy one by judges sitting at *nisi prius;* and even the court *en banc,* after the matter had been fully discussed in several opinions, came to the conclusion that "it is not easy to explain to a jury the nature of this liability." [34] The trouble is not with the judges, but with the rule they are set to apply. The rule says, first, that the injury must be intentional, and, second, that the defendant's intention is not an essential element. The wrong may consist of negligence, but it must be greater than gross negligence. Nothing but confusion can result from the attempt to explain these propositions to a jury. Either it should be held (contrary to the whole trend of the law) that the intent is material and must be proved, or else the rule should be abandoned.

The abandonment of the rule would not affect results as largely as might at first seem probable. In many of the cases where the rule and its application to the evidence in hand have been discussed, it would seem that the same result would have been reached if the court had applied the general rule of ordinary care under the circumstances. The trend of the argument in these cases is toward the conclusion that there was nothing in the conduct complained of which was other than that of the ordinary man having the same situation to deal with. Applying to the evidence the strict rule obtaining in these jurisdictions as to what amounts to proof of negligence, the conclusion would be reached that there was no failure to use ordinary care under the circumstances.

Assuming, however, that the rule has a substantial and practical basis, how does its application avoid the difficulty thought to be incident to applying the Michigan rule? The only difficulty there seems to be on the issue of what one ought to anticipate; and

[33] Grill *v.* General Iron Screw Collier Co., L. R. [1866] 1 C. P. 600.

[34] Banks *v.* Braman, 188 Mass. 367, 74 N. E. 594 (1905).

the principle that one must anticipate as much as the average man would foresee, applies equally under either rule. Difficulties which arise in the application of one rule must be dealt with in applying the other.

Go back to the example of the two trolley cars, one containing a trespasser whose head is seen through the car window by an oncoming motorman, the other car not seen by the motorman, but reasonably to be expected, with its crew and passengers. In fact an unknown and unsuspected trespasser is among these passengers. If under the Michigan rule the motorman ought (as some think) to be held guilty of neglect toward the trespasser in the second case, because he knew passengers might be approaching, why, under the Massachusetts rule, should his conduct not be called reckless toward the trespasser because it is so as to the passengers? If under the Massachusetts rule he is not in fault as to trespassers until he has notice of their presence, why should he be under the Michigan rule?

A distinction has sometimes been thought to lie in the proposition that under the Massachusetts rule there was liability only for intentional wrong, and that there could be no intent when there was no knowledge, actual or imputed. But it appears that this so-called intent is not a state of mind actually existing. It is merely a part of a rule forbidding acts under certain circumstances. Like the rule of ordinary care, it is an external standard. If under the Michigan rule acts can be deemed negligent as to A. because they are so as to B., why, under the Massachusetts rule, may not acts which are reckless as to C. be so treated as to his companion D.? Indeed, there is moral ground for the argument that the liability to D. should exist when it ought not as to A.[35]

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[35] An outcropping of this idea that in the so-called intentional wrong cases there is some element of moral turpitude, not to be found in negligence cases generally, is the rule sometimes announced that contributory negligence is not a defense. Aiken *v.* Holyoke Street Railway, 184 Mass. 269, 68 N. E. 238 (1903). Of course the direct and immediate tendency of the act to produce the result, which is required to make the act wanton or reckless, will ordinarily preclude the possibility of contributory negligence; but cases may arise when it will exist. And since the wantonness or recklessness does not depend upon a state of mind, but may consist wholly of inadvertence, it follows either that contributory negligence is a defense, or else that the doctrine of comparative negligence is approved of. In McKeon *v.* New York, New Haven & Hartford Railroad Co., 183 Mass. 271, 67 N. E. 329 (1903), the discussion seems to imply that

It is, then, merely a question of which is the more just, logical, and workable rule of conduct, — that which always applies the standard of reasonableness, or that which makes an exception to the rule.

It has seemed to some courts, and rightly, that acts which create a liability to an invitee ought not to impose one in favor of a trespasser. The error came in the assumption that the rule of ordinary care under the circumstances, if invoked in favor of the trespasser, would bring about such an unjust result. There has been a failure to recognize that the rule of ordinary care is only that of average conduct; that it may be true that the average man does not take the same precautions for a trespasser as he does for his guest; and that in no case can the trespasser recover save by showing that at the time of injury he could not, while the defendant could, prevent the damage by acting according to legal standards. Failing to perceive that the application of these principles would work out justice, and feeling instinctively that something must be wrong in a rule which placed the tramp on an equal footing with the guest, a remedy was sought in the use of the confusing and philosophically meaningless term "intentional injury."

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contributory negligence is a defense; and Black *v.* New York, etc. Co., 193 Mass. 448, 79 N. E. 797 (1907), limits the exception so that it merely makes a *primâ facie* case for the plaintiff on the issue of his own care, and declares that a recovery is allowed only upon a last clear chance theory.